



## **DEPARTMENT OF TRANSPORTATION**

### **Federal Highway Administration**

**[Docket No. FHWA-2022-0027]**

#### **Notice and Request for Comment on FHWA's Review of its General Applicability**

#### **Waiver of Buy America Requirements for Manufactured Products**

**AGENCY:** Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

**ACTION:** Notice; request for comments.

**SUMMARY:** The FHWA is seeking comments on its existing general applicability waiver for manufactured products under its Buy America waiver authorities. Following review and consideration of comments, FHWA will publish a determination on whether to continue, discontinue, or otherwise modify the waiver and will consider other actions related to the implementation of Buy America requirements for manufactured products.

**DATES:** Comments must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Please submit your comments to the Federal eRulemaking Portal at [www.regulations.gov/](https://www.regulations.gov/), Docket: FHWA-2022-0027, and follow the online instructions for submitting comments.

*Instructions:* You must include the agency name and docket number at the beginning of your comments. Except as described below under the heading "Confidential Business Information," all submissions received, including any personal information provided, will be posted without change or alteration to [www.regulations.gov](https://www.regulations.gov). For more information, you may review DOT's complete Privacy Act Statement published in the Federal Register on April 11, 2000 (65 FR 19477).

**FOR FURTHER INFORMATION CONTACT:** For questions about this notice, please contact Mr. Brian Hogge, FHWA Office of Infrastructure, 202-366-1562, or via e-mail at [Brian.Hogge@dot.gov](mailto:Brian.Hogge@dot.gov). For legal questions, please contact Mr. David Serody, FHWA Office of the Chief Counsel, 202-366-4241, or via e-mail at [David.Serody@dot.gov](mailto:David.Serody@dot.gov). Office hours for FHWA are from 8 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access and Filing**

A copy of this notice, all comments received on this notice, and all background material may be viewed online at [www.regulations.gov](http://www.regulations.gov) using the docket number listed above. Electronic retrieval assistance and guidelines are also available at [www.regulations.gov](http://www.regulations.gov). An electronic copy of this document may also be downloaded from the Office of the Federal Register's Website at: [www.FederalRegister.gov](http://www.FederalRegister.gov) and the Government Publishing Office's Website at: [www.GovInfo.gov](http://www.GovInfo.gov).

**Confidential Business Information**

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this notice, it is important that you clearly designate the submitted comments as CBI. You may ask FHWA to give confidential treatment to information you give to the Agency by taking the following steps: (1) Mark each page of the original document submission containing CBI as "Confidential"; (2) send FHWA, along with the original document, a second copy of the original document with the CBI deleted; and (3) explain why the information you are submitting is CBI. FHWA will protect confidential

information complying with these requirements to the extent required under applicable law. If DOT receives a FOIA request for the information that the applicant has marked in accordance with this notice, DOT will follow the procedures described in its FOIA regulations at 49 CFR 7.29. Only information that is marked in accordance with this notice and ultimately determined to be exempt from disclosure under FOIA and § 7.29 will not be released to a requester or placed in the public docket of this notice.

Submissions containing CBI should be sent to: Mr. Brian Hogge, FHWA, 1200 New Jersey Avenue SE, HICP-20, Washington, DC 20590. Any comment submissions that FHWA receives that are not specifically designated as CBI will be placed in the public docket for this matter.

FHWA encourages commenters to share all information responsive to the questions below, including confidential information. Doing so will allow FHWA to have a complete picture of the effects of continuing, discontinuing, or modifying the existing general applicability waiver for manufactured products. Submitting information on domestic production or plans to increase domestic production will ensure that FHWA can make informed decisions to protect domestic manufacturers' investments from international competition.

### **Executive Order 14005**

In January 2021, President Biden issued Executive Order (E.O.) 14005, titled Ensuring the Future is Made in All of America by All of America's Workers (86 FR 7475, Jan. 28, 2021). The E.O. sets forth a policy that Agencies should, consistent with applicable law, maximize the use of goods, products, and materials produced in, and services offered in, the United States. The E.O. helps promote private sector investment in the production of goods critical to our national security and economic stability. As we bolster domestic supply chains, we create jobs, strengthen our manufacturing sector, and

create economic opportunities for more of America's small businesses. FHWA is committed to ensuring strong and effective Buy America implementation consistent with E.O. 14005.

### **Build America, Buy America Act of 2021**

On November 15, 2021, the President signed into law the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA), (Pub. L. 117-58). The BIL includes the Build America, Buy America Act ("BABA"), which expands the coverage and application of Buy America preferences in Federal financial assistance programs for infrastructure. BIL, div. G §§ 70901-27.

BABA requires that iron, steel, manufactured products, and construction materials made available for a Federal financial assistance program for infrastructure be produced in the United States. BABA § 70914. However, BABA provides that the preferences under Section 70914 apply only to the extent that a domestic content procurement preference as described in Section 70914 does not already apply to iron, steel, manufactured products, and construction materials. BABA § 70917(a)-(b). By statute at 23 U.S.C. 313, as discussed below, FHWA has existing Buy America domestic content preferences for steel, iron, and manufactured products.

In the case of manufactured products, the statute defines "produced in the United States" to mean that:

- (i) the manufactured product was manufactured in the United States; and
- (ii) the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation.

BABA § 70912(6)(B).

In addition, BABA expresses a general policy preference against general applicability waivers. For example, Section 70913(c) of BABA requires Federal

Agencies to identify “deficient programs” for financial assistance, including programs that are “subject to a waiver of general applicability not limited to the use of specific products for use in a specific project.” BABA § 70913(c)(2). Section 70914(d) also requires Federal Agencies to review existing general applicability waivers of Buy America requirements by publishing in the Federal Register a notice that: (i) describes the justification for a general applicability waiver; and (ii) requests public comments for a period of not less than 30 days on the continued need for the general applicability waiver. BABA § 70914(d). Obtaining information through this notice will help FHWA determine the current state of domestic production of manufactured products and what may be required to incentivize increase domestic production, in line with the goals of BABA and E.O. 14005. At the same time, FHWA will also consider how to ensure that manufactured products are widely available in the immediate future for FHWA-funded projects in the United States.

Following the initial notice and review and consideration of comments received, the Agency must publish in the Federal Register a determination on whether to continue or discontinue the general applicability waiver. *Id.* Through this notice, FHWA describes the original justification for its general waiver for manufactured products and seeks public comments on whether it continues to be justified.

### **FHWA Buy America Requirements**

Section 313(a) of title 23, U.S.C. requires that all steel, iron, and manufactured products used in FHWA-funded projects be produced in the United States. Under 23 U.S.C. 313(b) and its implementing regulation at 23 CFR 635.410(c), FHWA can waive the application of this requirement if their application would be inconsistent with the public interest, or if products are not produced in the United States in sufficient and

reasonably available quantities and of a satisfactory quality.<sup>1</sup> Using this authority, FHWA issued in 1983 a public interest waiver of general applicability of FHWA's Buy America requirement for manufactured products (Manufactured Products General Waiver). 48 FR 53099 (Nov. 25, 1983). Based on the Manufactured Products General Waiver, which is the subject of this notice and discussed in more detail below, FHWA does not currently apply the Buy America requirements to manufactured products except for predominantly steel and iron manufactured products and predominantly steel and iron components of manufactured products. FHWA also applies the BABA domestic preference requirements to construction materials.

For all predominantly steel or iron materials, products, or components delivered to a project site for permanent incorporation into a highway project using Title 23, U.S.C. funds, all manufacturing processes, including application of a coating, must occur in the U.S. *See* 23 CFR 635.410. Coating includes all processes that protect or enhance the value of the material to which the coating is applied. Such projects involve both the acquisition and installation of such equipment. Under existing policy and practice, FHWA applies its Buy America requirement to both predominantly steel and iron products and predominantly steel and iron components of manufactured products even if the product itself is not predominantly steel and iron.<sup>2</sup> In addition, FHWA's Buy America requirement applies to all contracts, regardless of the funding source, if any contract within the scope of a determination under the National Environmental Policy Act involves an obligation of Title 23, U.S.C. funds. *See* 23 U.S.C. 313(h).

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<sup>1</sup> 23 U.S.C. 313(b)(3) also allows for FHWA to waive the application of 23 U.S.C. 313(a) if inclusion of domestic material will increase the cost of the overall project contract by more than 25 percent. FHWA implements this provision in 23 CFR 635.410(b)(3)

<sup>2</sup> *See* FHWA's Buy America Questions and Answers for the Federal-aid program, available at [https://www.fhwa.dot.gov/construction/contracts/buyam\\_qa.cfm](https://www.fhwa.dot.gov/construction/contracts/buyam_qa.cfm). The answer to question 12 explains that FHWA's Buy America requirements apply to any predominantly steel or iron component of a manufactured product regardless of the overall composition of the manufactured product.

In general, FHWA will consider a Buy America waiver only when the conditions of 23 U.S.C. 313(b) and Section 70914(b) of BABA have been met. Section 635.410(c) of Title 23 CFR establishes FHWA's process for consideration of waivers under 23 U.S.C. 313(b). Section 70914(d) of BABA, described above, also sets forth a process for Federal Agencies to review existing general applicability waivers of Buy America requirements. This notice is being issued pursuant to the requirement in Section 70914(d) of BABA that Agencies review general applicability waivers, and in accordance with the process set forth therein. The general applicability waiver being reviewed here is the existing Manufactured Products General Waiver.

### **Nationwide General Applicability Waiver for Manufactured Products**

FHWA's Buy America requirements for the Federal-aid highway program were first established in 1978 through Section 401 of the Surface Transportation Assistance Act (1978 STAA), Public Law 95-599 (1978). In 1982, these requirements were modified by Section 165 of the Surface Transportation Assistance Act (1983 STAA), Public Law 97-424 (1983), which provides the basic statutory language for FHWA's current Buy America requirements.<sup>3</sup> The Moving Ahead for Progress in the 21st Century Act (MAP-21) codified this provision in 23 U.S.C. 313. The provision prohibits the obligation of Federal-aid Highway funds for projects unless steel, iron, and manufactured products used in such projects are produced in the United States.

Following the 1978 STAA, FHWA issued an emergency rule to implement the Buy America requirement. Simultaneously, FHWA granted a general waiver for

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<sup>3</sup> In 1978, Section 401 of the Surface Transportation Assistance Act, Pub. L. No. 95-599 (1978) provided broad domestic origin requirements for various materials and supplies used in the Federal-aid highway program. In 1982, these requirements were modified by Section 165 of the Surface Transportation Assistance Act (STAA), Pub. L. No. 97-424 (1983), which provides the current source legislation for FHWA's Buy America requirements. Section 165 provided that, with exceptions, funds authorized by the STAA of 1982, title 23 of the United States Code, and certain other laws may not be obligated for highway projects unless steel, cement, and manufactured products used in such projects are produced in the United States. In 1984, Congress amended Section 165(a) of the 1983 STAA by removing the word "cement." Pub. L. 98-229, 98 Stat. 55, Sec. 10. In addition, Congress added coverage for iron in 1991. Intermodal Surface Transportation Efficiency Act (ISTEA), Pub. L. 102-240, Section 1048(a) (1991).

manufactured products. At the time, FHWA explained that foreign structural steel was the only commodity having a significant nationwide effect on the cost of Federal-aid highway construction projects. While natural materials (such as sand, stone, gravel, and earth materials) and petroleum-based products (such as fuels, lubricants, and bituminous products) were also used in large amounts in Federal-aid highway construction projects, foreign competition in natural materials was not significant due to their high transportation cost and the lack of availability of petroleum-based products from domestic sources in sufficient and reasonable quantities. Thus, FHWA found that it was in the public interest to waive the Buy America requirements for products and materials other than structural steel. *See* 43 FR 53717-01 (Nov. 17, 1978) and 45 FR 77455-01 (Nov. 24, 1980).

In 1983, following passage of the 1983 STAA, FHWA reaffirmed that it continued to be in the public interest to waive the Buy America requirements for manufactured products. *See* 48 FR 1946 (Jan. 17, 1983); 48 FR 53099 (Nov. 25, 1983). Because the Manufactured Products General Waiver issued in the preamble to the 1983 final rule is a waiver of general applicability that is not subject to a project-by-project determination, FHWA refers to it as a general waiver.

### **2013 Request for Comments on the General Applicability Waiver for Manufactured Products**

On July 10, 2013, FHWA published a request for comments in the Federal Register (78 FR 41492) (2013 RFC) regarding the continued need, in whole or in part, for the Manufactured Products General Waiver.<sup>4</sup> FHWA asked questions including:

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<sup>4</sup> The notice also sought comments regarding the continued need, in whole or in part, for the general waiver from Buy America for ferry boat equipment and for pig iron and processed, pelletized, and reduced iron ores. In addition, it sought comment on the continuing need for the FHWA's minimal use threshold.



- Has the nature of the Federal-aid highway program and the U.S. steel/iron manufacturing industry changed to such a degree that FHWA needs to reconsider its criteria for applying Buy America requirements to manufactured products?
- Are there specific or general types of manufactured products that should not be covered by a public interest waiver and why?
- Are there specific issues that should be considered for manufactured products that include steel or iron components and subcomponents?

FHWA received 81 comments in response to the 2013 RFC. FHWA generally received supportive comments on the continued need for the Manufactured Products General Waiver. Many of the adverse comments FHWA received centered on a 2012 guidance memorandum on steel and iron manufactured products, which FHWA rescinded in December of 2015.<sup>5</sup> After considering the comments received on the 2013 RFC, FHWA decided to take no further action regarding the Manufactured Products General Waiver, and it remains in force today.

### **Compliance Standards for Manufactured Products**

FHWA's Buy America statute at 23 U.S.C. 313(a) and Section 70914(a) of BABA both require that manufactured products used in federally assisted projects be produced in the United States. As described above, Section 70912(6)(B) of BABA additionally defines the term "produced in the United States" to mean that the manufactured product was manufactured in the United States and that the cost of the product's domestically produced components exceeds 55 percent of the total cost of all components. Section 313 of Title 23, however, does not provide a similar definition for the term "produced in the United States," and FHWA has not promulgated such a definition for manufactured products through regulation.

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<sup>5</sup> Rescission of the 2012 memorandum followed the decision in *United Steel, Paper and Forestry, Rubber, Mfr., Energy, Allied Indus. and Serv. Workers Int'l Union v. FHWA*, 151 F. Supp. 3d 76 (D.D.C. 2015).

FHWA also does not currently have a standard for determining the cost of components of a manufactured product. One such potential standard that could be considered for adoption by FHWA is the definition provided at 48 CFR 25.003 of the Federal Acquisition Regulations (FAR).

Another issue to consider is how the applicable standards for domestic content in manufactured products would apply to the steel and iron components of those products. Under FHWA's existing practice for iron and steel, Buy America requirements apply to any predominantly steel or iron component of a manufactured product regardless of the overall composition of the product.<sup>6</sup>

### **Request for Comments**

Through this notice, FHWA is soliciting information and suggestions from the public and a broad array of stakeholders across public and private sectors regarding whether it should continue, discontinue, or modify, in whole or in part, the Manufactured Products General Waiver. FHWA is also soliciting information on other issues related to the application of Buy America requirements to manufactured products used in Federal-aid highway projects.

### **Questions on FHWA's General Waiver for Manufactured Products**

In answering the questions below, please also explain the impacts of your suggested course of action for FHWA on administering and delivering Federal-aid highway projects and on supporting domestic manufacturing and jobs.

#### *General Considerations*

1. Does the justification that was used by FHWA in granting the General Waiver in 1983 still apply? Specifically, is FHWA's approach to the application of Buy America

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<sup>6</sup> See <https://www.fhwa.dot.gov/programadmin/contracts/122297.cfm> and Question #12, at [https://www.fhwa.dot.gov/construction/contracts/buyam\\_qa.cfm](https://www.fhwa.dot.gov/construction/contracts/buyam_qa.cfm).

requirements to manufactured products still appropriate, considering the enactment of the BABA, and standards established therein?

2. What systems or processes do funding recipients, contractors, and manufacturers have to manage compliance with Buy America requirements?

3. With respect to domestic manufacturers of products procured using FHWA financial assistance, please provide information regarding the volume of products procured through FHWA financial assistance.

4. With respect to domestic manufacturers of products previously procured or expected to be procured using FHWA financial assistance, do you expect to expand your domestic manufacturing based on the increase in demand created by recent Federal investments? If so, by how much and over what time period? If applicable, what is the timeline to bring online additional capacity compliant with BABA?

5. Are there specific types of manufactured products that are widely used on Federal-aid highway projects for which a large portion of the components are known to not be produced in the United States or not produced in sufficient quantities? If so, what are those components, what manufacturer produces them, and where are they primarily produced? What are the obstacles to having those components produced in the United States? Please provide data to support your comment.

#### *Compliance Standards for Manufactured Products*

6. Should FHWA consider defining the term “produced in the United States” for manufactured products via rulemaking? If so, should it consider adopting the definition for the same term that is used in Section 70912(6)(B) of BABA, as described above? Or should it consider adopting some other definition? Should the definition vary by product or product type? Should FHWA adopt the approach for determining “cost of components” of a manufactured product described by the Office of Federal Financial Management in the Office of Management and Budget in the notification of proposed

guidance published on February 9, 2023 (88 FR 8374 (Feb. 8, 2023)), which is the same as is used in the FAR (48 CFR 25.003)?

7. With respect to domestic manufacturers of products previously procured or expected to be procured using FHWA financial assistance, are your products “produced in the United States” as defined by Section 70912(6)(B) of BABA? In other words, are your manufactured products manufactured in the United States and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product?

8. If FHWA were to adopt a definition for manufactured products produced in the U.S., should it consider also defining what it means for a manufactured product to be manufactured in the U.S.? If so, what manufacturing processes or assembly steps should be required to occur domestically? Should the requirement vary by product or product type?

9. Federal financial assistance from FHWA may support the procurement of “rolling stock.” For example, States and local governments may seek to purchase certain electric vehicles under the Congestion Mitigation and Air Quality Program.<sup>7</sup> Should FHWA establish any special provisions for applying Buy America requirements for manufactured products to “rolling stock” such as vehicles or wheeled equipment? If so, should FHWA consider applying requirements to rolling stock similar to those used by other Operating Administrations of the Department of Transportation, such as the Federal Transit Administration<sup>8</sup> or the Federal Railroad Administration?<sup>9</sup>

#### *Manufactured Products with Steel and Iron Components*

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<sup>7</sup> See 23 U.S.C. 149(b)(8)(C).

<sup>8</sup> See 49 CFR 661.11.

<sup>9</sup> See 49 U.S.C. 22905(a)(2)(C) (allowing FRA to waive its Buy America requirements if it finds that rolling stock cannot be bought and delivered in the United States within a reasonable time).

10. Are there specific issues that should be considered for manufactured products that include steel or iron components?

11. Should FHWA define the meaning of a “predominantly” steel and iron product?

Why or why not? For example, could this help to distinguish between manufactured products and steel and iron products, for the purpose of applying Buy America requirements?

12. If FHWA adopts a definition for manufactured products produced in the U.S. similar to that used in Section 70912(6)(B) of BABA how should that definition be applied to predominantly iron or steel components of manufactured products?

#### **Comment Period for Notice**

FHWA will consider comments received in the 30-day comment period in determining whether to continue, discontinue, or modify the current Manufactured Products General Waiver, or to consider other actions related to the implementation of Buy America requirements for manufactured products. Comments received after this period will be considered to the extent practicable.

Issued in Washington, DC under authority delegated in 49 CFR 1.85.

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Shailen P. Bhatt,  
Administrator,  
Federal Highway Administration.